PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 174

NEAL MERLE SMITH,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

No. 177

RICHARD W. MARSHALL,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the District Court of Lee County, Iowa, in *Marshall* v. *Bennett* (No. 177), has not been officially reported and is found at MR 6.* No opinion of the Lee

County, Iowa, District Court was delivered in *Smith* v. *Bennett* (No. 174). In *Smith*, the deputy clerk of the District Court of Lee County, Iowa, wrote a letter refusing to file the petition for a writ of habeas corpus (SR 7). The orders of the Supreme Court of Iowa were likewise not published in the official reports, but are found at MR 17 and SR 10.

Concise Statement of Grounds on Which Jurisdiction of Court Invoked

The jurisdiction of this court is invoked under 28 United States Code, Sections 1257, 2103 and 2101(c). The dates of the orders sought to be reviewed are: No. 174, *Smith* v. *Bennett*—December 15, 1959; No. 177, *Marshall* v. *Bennet*, October 20, 1959. A petition for certiorari was filed in *Marshall* v. *Bennett*, No. 177, on October 31, 1959. Smith filed an appeal in this court on February 23, 1960.

Constitutional Provisions and Statutes Involved

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Article I, Sec. 9, Constitution of the United States: "The privilege of the writ of habeas corpus shall not be sus-

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• The Record in *Marshall* v. *Bennett*, No. 177, is hereafter referred to as "MR" and the Record in *Smith* v. *Bennett*, No. 174, is hereafter referred to as "SR."

pended unless in cases of rebellion or invasion the public safety may require it."

Article I, Sec. 13, Constitution of the State of Iowa: "The writ of habeas corpus shall not be suspended or refused when application is made as required by law, unless in case of rebellion, or invasion the public safety may require it."

Section 606.15, 1958 Code of Iowa: "The Clerk of the District Court shall charge and collect the following fees . . . 1. For filing any petition, appeal . . . and docketing the same, $4.00 . . . "

Section 685.3, 1958 Code of Iowa: "The Clerk [of the Supreme Court] shall collect the following fees . . . Upon filing each appeal, $3.00."

Questions Presented for Review

The orders granting certiorari limited the question presented for review to the application of the rule announced by the Court in *Burns* v. *Ohio*, 360 U. S. 252, to the facts of these two cases. Questions presented for review may, therefore, be stated as follows:

May a state constitutionally deny access to its courts to a pauper in habeas corpus proceedings by refusing to allow a petition for a writ of habeas corpus to be filed unless and until a filing fee is paid?

May a state constitutionally deny access to its appellate courts to a pauper attempting to appeal in habeas corpus proceedings by refusing to consider an appeal unless and until a filing fee is paid?

Statement of the Cases

The cases presented by petitioners Smith and Marshall are basically similar. For purposes of clarity, the cases are stated separately below.

A. *Smith* v. *Bennett*, No. 174

Petitioner was sentenced to a term of ten years in the State Penitentiary at Fort Madison, Iowa, for breaking and entering. In due course he was paroled to his home in Iowa City, Iowa. After he had been on parole for a short time, he was advised by the parole-board that he had violated his parole. He states that on July 15, 1959, he was arrested by the Iowa City, Iowa, police and was confined in the Iowa City jail for four hours, thereafter being transferred to the Johnson County jail, in Iowa City, Iowa, where he was held for six days. While in the Johnson County jail he was not permitted to call his home, attorney, or place of employment, nor was he taken before a court of law. On the sixth day of his confinement in the Johnson County jail he was removed to the State Penitentiary at Fort Madison, Iowa. When he was returned to the penitentiary he was informed that he had "lost" 120 days on account of his parole violation.

He attempted to file a petition for a writ of habeas corpus in the District Court in and for Lee County, Iowa, in which he raised constitutional questions about the method in which he had been picked up in connection with his alleged parole violation (SR 1), accompanying his petition for a writ of habeas corpus with a motion to proceed *in forma pauperis* (SR 5), and an affidavit of poverty (SR 6). On November 14, 1959, the deputy clerk of the Lee County, Iowa, District Court wrote to petitioner Smith telling him that:

"If you will mail this office $4 to cover filing fee for the above, it will be presented to the Honorable W. L. Huiskamp" (SR 7).

Petitioner Smith then filed a motion in the Iowa Supreme Court for leave to appeal *in forma pauperis* (SR 8). He supported his motion with an affidavit of poverty (SR 9). The Supreme Court of Iowa denied petitioner's motion (SR 10).

Petitioner Smith filed an appeal in this Court, and on June 27, 1960, the Court dismissed the appeal, but treated the papers as a petition for certiorari and granted certiorari, limited, however, to the question decided in *Burns* v. *Ohio*, 360 U. S. 252 (SR 16). The Court also granted petitioner's motion for leave to proceed *in forma pauperis* (SR 17).

B. *Marshall* v. *Bennett*, No. 177

Richard W. Marshall was charged by the County Attorney of Lee County, Iowa, with the crime of breaking and entering. Marshall, who was represented by counsel, entered a plea of guilty on August 28, 1958. He was sentenced on the same day to ten years imprisonment at the Iowa State Penitentiary at Fort Madison, Iowa.

In September, 1959, petitioner attempted to file a petition for a Writ of Habeas Corpus in the Lee County, Iowa, District Court. He alleged that he was "illegally restrained of his liberty under Color of the United States Constitution, contrary to the provisions of the 14th Amendment, Section 1, thereof, express or implied therein" (MR 1). The detention was illegal, he claimed, because the County Attorney's information was "fatal on its face" and the "plea thereon was obtained by coercion and duress" (MR 1). Petitioner also filed an application for leave to pro-

ceed *in forma pauperis* (MR 4) and an affidavit in support of the application (MR 4).

On September 19, 1959, the District Court denied petitioner the right to file his petition for habeas corpus without payment of the filing fee (MR 6).

Petitioner attempted to appeal to the Supreme Court of Iowa and filed a motion to settle the record on appeal (MR 9). In response to this motion the Lee County, Iowa, District Court issued an order stating that there was no record to settle on appeal because nothing had ever been filed in the District Court; the petition for a writ of habeas corpus was "never formally considered by the Court" (MR 10).

In the Supreme Court of Iowa the petitioner moved for leave to proceed *in forma pauperis* (MR 13) and supported his motion by an affidavit (MR 15). The application was denied (MR 17).

A petition for certiorari and a motion for leave to proceed *in forma pauperis* were filed in this Court. On June 27, 1960, the Court granted the motion for leave to proceed *in forma pauperis* and granted certiorari, limited, however, to the question decided in *Burns* v. *Ohio*, 360 U. S. 252 (MR 22).

Summary of Argument

In Iowa, there is no *in forma pauperis* procedure applicable to habeas corpus proceedings. Hence, indigent prisoners are kept from the courts. But *Burns* v. *Ohio*, 360 U. S. 252, and *Griffin* v. *Illinois*, 351 U. S. 12, teach that the states may not under the 14th Amendment to the United States Constitution deny appellate review in *criminal* proceedings to the poor merely because of their poverty. While

it is true that habeas corpus is a civil proceeding, it is a highly regarded remedy protecting, as it does, the liberty of the individual. *Bowen* v. *Johnston*, 306 U. S. 19. Indeed, the right to habeas corpus is imbedded, not only in the Constitution of the United States, and the Constitution of the State of Iowa, but also in the Constitutions of at least 46 other states of the Union. Habeas corpus occupies, therefore, a highly privileged place in American law.

Habeas corpus relief should not be denied to prisoners merely because of their poverty. The court need not extend the rule of *Burns* v. *Ohio, supra,* to all civil proceedings, but can draw the line at those civil proceedings involving the liberty of the individual. This has been done in Oregon. *Barber* v. *Gladden*, 298 P. 2d 986 (Ore. 1956).

We submit further that the states are required to furnish some form of post conviction review for criminal defendants. Cf. *Mooney* v. *Holohan*, 294 U. S. 103. Iowa—because of the filing fee requirement—provides no post conviction review for indigent prisoners; the 14th Amendment to the United States Constitution requires her to open her courts to such indigent prisoners.

We therefore urge the Court to hold that Sections 606.15 and 685.3, 1958 Code of Iowa, are unconstitutional under the equal protection and due process clauses of the 14th Amendment in so far as those statutes require filing fees from indigent persons in habeas corpus proceedings.

ARGUMENT

A. A Petition for a Writ of Habeas Corpus Cannot Be Filed in Iowa Nor Can an Appeal Be Taken in Habeas Corpus Proceedings Unless Filing Fees Are First Paid.

Iowa statutes provide that "the Clerk of the District Court *shall* charge and collect" (emphasis supplied) a fee of $4 for filing any petition, and docketing the same, Sec. 606.15, 1958 Code of Iowa, and that the Clerk of the Supreme Court "*shall* collect" (emphasis supplied) $3 upon filing each appeal. Sec. 685.3, 1958 Code of Iowa.

Although the Iowa Code provides that transcripts shall be furnished at the expense of the County where the criminal defendant has perfected an appeal and has convinced the judge that he cannot pay for the transcript, Sec. 793.8, 1958 Code of Iowa, there are no other provisions in the Iowa Code or the rules of the Iowa court allowing an appeal, or the filing of a petition for a writ of habeas corpus without payment of a filing fee.

The state conceded in its Further Response to the petition for certiorari in *Henry Hooper* v. *John E. Bennett*, No. 178, October Term, 1960, petition dismissed as improvidently granted on October 10, 1960 that " . . . in Iowa, indigents are precluded from filing habeas corpus petitions, unless they pay a filing fee."

It is clear, therefore, that these petitioners, who in their petitions for a writ of habeas corpus raise constitutional questions with respect to their continued detention (the merits of which are not before this Court), have been denied the right to have their petitions for habeas corpus considered by the Iowa courts. They have been denied this right because "indigents are precluded from filing habeas corpus petitions, unless they pay a filing fee."

Any other person in Iowa, any like prisoner in the State Penitentiary at Fort Madison, may file a petition for a writ of habeas corpus, and, if he pays the necessary filing fee, his petition will be filed and considered by the Court. Article 1; Sec. 13. Constitution of the State of Iowa; Chap. 663, 1958 Code of Iowa. Any other person in Iowa, any like prisoner in the State Penitentiary at Fort Madison, may file an appeal from a denial of a writ of habeas corpus, and, if he pays the filing fees, his appeal will be considered by the Supreme Court of Iowa.

The only reason these petitions were not considered by the Iowa courts was the failure to pay the necessary filing fees. It is true that the fees are small. For a person without any means at all—and the State has not challenged the affidavits of poverty filed in these cases—it matters little whether the required fee is $4 or $400: both amounts are beyond the means of the petitioners here.

B. Iowa May Not Constitutionally Deny an Indigent Petitioner for a Writ of Habeas Corpus the Use of Its Courts by Requiring Him to Pay a Filing Fee.

1. *Burns* v. *Ohio.*

The question presented in *Burns* v. *Ohio,* 360 U. S. 252, was whether a state may constitutionally require an indigent defendant in a *criminal* case to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts.

In the *Burns* case the petitioner was convicted in Ohio in 1953; the conviction was affirmed by the Ohio Court of Appeals in the same year. He filed a notice of appeal in the Court of Appeals at once, but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme

Court of Ohio. He attached to the papers which he sought to file in the Supreme Court of Ohio an affidavit of poverty in which he stated that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action." 360 U. S. at 253-254. He also attached a motion for leave to proceed *in forma pauperis*.

The Clerk of the Supreme Court of Ohio refused to file the papers and returned them with the following letter:

> "We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the Rules of Practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of the docket fee. For that reason we cannot honor your request.
>
> "We are returning the above mentioned papers to you herewith." 360 U. S. at 254.

This Court granted certiorari, 358 U. S. 919, and held that the State of Ohio could not constitutionally impose financial barriers on the right of indigent criminal defendants to appeal. Said the Court at 360 U. S. 257-258:

> "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio . . . Here, the action of the State has completely barred the petitioners from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law . . . "

Mr. Justice Frankfurter and Mr. Justice Harlan dissented on the ground that the letter from the Clerk of the Ohio Supreme Court was not a final judgment within the meaning of 28 U. S. C., Section 1257.

Putting to one side the question of final judgment, it is obvious that the facts in *Burns* v. *Ohio, supra,* and in the cases at bar are quite similar. In *Burns* the criminal defendant was denied a right to appeal to the Supreme Court of Ohio because of his inability to pay filing fees; in the cases at bar, the petitioners, convicted of crimes and incarcerated in the state penitentiary, are denied the right to file petitions for habeas corpus because of their inability to pay filing fees; they are also denied the right to proceed in the Supreme Court of Iowa without payment of the filing fees.

2. *Griffin* v. *Illinois*

In *Griffin* v. *Illinois*, 351 U. S. 12, the petitioner was convicted of armed robbery in Illinois. He filed a motion requesting that a certified copy of the entire record, including a stenographic transcript of the proceedings be furnished him without cost. He alleged that he was a poor person, "with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal . . . " 351 U. S. 13. The Illinois courts denied his motion, thus refusing to furnish him with a transcript at public expense. The Supreme Court of the United States held that the defendant must be furnished with a transcript, or an adequate substitute. Mr. Justice Black in an opinion joined in by three members of the Court stated:

> "Providing equal justice for poor, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the

> royal concessions of Magna Carta: 'to no one will we sell, to no one will we refuse, or delay, right or justice . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him or send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition our own constitutional guarantees of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system, all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' . . . 351 U. S. at 16-17.

In the same case, at 351 U. S. page 19, Mr. Justice Black said:

> "Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Mr. Justice Frankfurter joined in the disposition of the *Griffin* case, and in an opinion concurring in the judgment stated at 351 U. S. page 23:

"But when a state deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

"To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a later-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' (John Cournos, in Modern Plutarch, p. 27.)"

And Mr. Justice Frankfurter continued:

"The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." 351 U. S. at p. 24.

The *Griffin* case, again, is very like the cases at bar. To secure an appellate review, the criminal defendant needed a transcript of the record. He could not pay for the transcript, and, therefore, but for the holding of this Court, he would have been denied an appellate review. The difference between the *Griffin* case and the cases at bar is that the *Griffin* case involved the right of a criminal defendant to a criminal appeal, whereas the cases at bar involve the

right of prisoners to file petitions for habeas corpus in the State courts.

3. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*

The decision announced by this Court in *Griffin* was followed in *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214, where the court said that a State "denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials". 357 U. S. at p. 216. And see *People* v. *Pride*, 3 N. Y. 2d 545, 147 N. E. 2d 719 (N. Y. Ct. of Appeals, 1958).

So here, these petitioners are denied a constitutional right if they cannot file a petition for a writ of habeas corpus merely because they are without funds to pay a filing fee. Great issues of personal freedom should not turn on possession of money; are the more fortunate economically to enjoy the privilege of the great freedom writ, while the less fortunate remain in jail?

C. The Rule of Burns v. Ohio, 360 U.S., 252, Should Be Extended to Habeas Corpus Proceedings.

1. The Nature of Habeas Corpus Proceedings.

Habeas corpus proceedings have geenrally been termed "civil" proceedings. During the course of its opinion, *In the Matter of Tom Tong*, 108 U. S. 556, 559, this Court stated:

> "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punish-

> ment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. . . . "

Accord: *Riddle* v. *Dyche*, 262 U. S. 333, 335-336.

One court, at least has taken the position that habeas corpus proceedings are criminal in nature, at least where relief is sought by a party charged with a crime. *Gleason* v. *Commissioners*, 30 Kansas 53, 1 Pac. 384. In that case the Kansas Supreme Court stated:

> "And it is also true that in many cases it is a purely civil remedy, as where it is sought in behalf of parents to obtain the custody of children, or for the relief of imprisoned debtors; but we think it is also a criminal proceeding, when sought as in this case for the relief of a party charged with crime."

If this Court were now to adopt the Kansas view, and characterize habeas corpus proceedings as criminal, at least where a prisoner seeks his freedom, there would be no distinction between these cases and *Burns* v. *Ohio*, 360 U. S. 252. Formal labels assigned to actions do not necessarily reveal their true nature. Habeas corpus is the post conviction method in Iowa (and in most of the States) for testing the constitutionality of a criminal's incarceration; and as the Kansas court said in *Gleason* v. *Commissioners, supra*, it is a criminal proceeding when sought for the relief of a party charged with crime. Habeas corpus is, we submit, a part of the criminal procedure in the United States.

2. Habeas Corpus is more than a mere civil action.

Even if habeas corpus is not a criminal proceeding, we submit that in Anglo-American law it is more than a mere civil proceeding.

Burton J. Hendrick in his book, *Bulwark of the Republic* (Little, Brown & Co. 1937), sets forth what is probably the popular view of habeas corpus at page 344:

> "These two latin words, habeas corpus—'you may have the body'—enshrined one of the greatest privileges of that Magna Carta which the barons wrung from a reluctant king at Runnymede. Until the fall of the bastille French monarchs enjoyed the pleasant prerogative of seizing any person who had incurred their displeasure, and, without making any charges or holding trial, throwing him into prison. There the sufferer would remain until he rotted, for there was no way by which his release could be obtained. Present-day reports from Germany, Italy and Russia [1937] indicate that this is still a common practice in those countries. But such high-handed measures are impossible where the writ of habeas corpus exists. In these countries friends of the imprisoned man at any time 'may have the body.' The officers of justice can be compelled to produce a prisoner in court, give the reasons for his incarceration, and present the evidence on which the accusation rests. Thus, so long as the writ of habeas corpus prevails, imprisonment on false or unsupported charges is impossible. And this safeguard of liberty is deeply imbedded in the Constitution of the United States. Nothing suggestive of French lettres de cachet or Hitlerian arrests and executions is possible under the American system."

The writ of habeas corpus can be traced back to an early age in English law. But, according to Plunkett, *A Concise History of the Common Law* (The Lawyers Co-operative Publishing Co., 2nd Edition 1936), p. 57:

> " . . . [I]t was in the Seventeenth Century that *habeas corpus* fought its greatest battle. The Crown had endeavored to establish the right of imprisoning without trial upon a warrant signed by the Secretary of State and a few Privy Counselors, alleging 'reasons of state'. Against so serious a claim of state absolutism habeas corpus became in the words of Seldon 'the highest remedy in law for any man that is imprisoned.' Throughout the Stuart period habeas corpus was steadily used and improved by the courts of common law. But procedural difficulties stood in the way . . . Many of these defects were remedied in an Habeas Corpus Act of 1679. . . . "

The passage of the Habeas Corpus Act of 1679 was described by Macaulay as follows:

> "The day of that prorogation, the 26th of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the royal assent. From the time of the Great Charter the substance of the law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right, but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied. The King would gladly have refused his consent to that measure: but he was about to appeal from his Parliament to his people on the question of the succession, and he could not venture at so critical a moment to reject a bill which was in the

highest degree popular." 1 Macaulay, History of England (Quartes & Coates, Philadelphia), p. 230.

The importance of the writ is illustrated by the fact that it was guaranteed by Article I, Sec. 9 of the Constitution of the United States. See also *The Federalist*, No. LXXXV (Hamilton) 472-473 (The Colonial Press 1901). And not only is the right to the writ guaranteed in Article I, Sec. 13 of the Constitution of the State of Iowa, but also in the Constitutions of the following States:

Art. I, Sec. 17, Constitution of Alabama, Art. I, Sec. 13, Constitution of Alaska; Art. 2, Sec. 14, Constitution of Arizona; Art. 2, Sec. 11, Constitution of Arkansas; Art. 1, Sec. 5, Constitution of California; Art. II, Sec. 21, Constitution of Colorado; Art. 1, Sec. 14, Constitution of Connecticut; Art. 1, Sec. 13, Constitution of Delaware; Sec. 7, Florida Declaration of Rights, Constitution of Florida (The writ of habeas corpus shall be grantable . . . freely and without cost . . .); Art. 1, Sec. 1, Constitution of Georgia; Art. 1, Sec. 5, Constitution of Idaho; Art. 2, Sec. 7, Constitution of Illinois; Art. 1, Sec. 27, Constitution of Indiana; Sec. 8, Bill of Rights, Constitution of Kansas; Sec. 16, Bill of Rights, Constitution of Kentucky; Art. 1, Sec. 10, Constitution of Maine; Art. VI, Sec. 98, Constitution of Massachusetts ("The privilege and benefit of the writ of habeas corpus shall be enjoined in this commonwealth in the most free, easy, cheap, expeditious and ample manner . . . "); Art. II, Sec. 11, Constitution of Michigan; Art. 1, Sec. 7, Constitution of Minnesota; Art. 3, Sec. 22, Constitution of Mississippi; Art. 1, Sec. 12, Constitution of Missouri; Art. III, Sec. 21, Constitution of Montana; Art. 1, Sec. 3, Constitution of Nebraska; Art. 1, Sec. 5, Constitution of Nevada; Pt. 2, Art. 91, Constitution of New Hampshire; Art. 1, Sec. 14, Constitution of New Jersey; Art. II, Sec. 7, Con-

stitution of New Mexico; Art. 1, Sec. 4, Constitution of New York; Art. 1, Sec. 21, Constitution of North Carolina; Sec. 5, Constitution of North Dakota; Art. 1, Sec. 8, Constitution of Ohio; Art. 2, Sec. 10, Constitution of Oklahoma; Art. 1, Sec. 23, Constitution of Oregon; Art. 1, Sec. 14, Constitution of Pennsylvania; Art. 1, Sec. 9, Constitution of Rhode Is.; Art. 1, Sec. 23, Constitution of So. Car.; Art. VI, Sec. 8, Constitution of So. Dak.; Art. 1, Sec. 15, Constitution of Tenn.; Art. 1, Sec. 12, Constitution of Texas; Art. 1, Sec. 5, Constitution of Utah; Ch. II, Sec. 33, Constitution of Vermont; Sec. 58, Constitution of Virginia; Art. 1, Sec. 13, Constitution of Washington; Art. III, Sec. 4, Constitution of West Virginia; Art. 1, Sec. 8, Constitution of Wisconsin; Art. 1, Sec. 17, Constitution of Wyoming.

Thus, the right to the writ of habeas corpus has been imbedded in the fundamental laws of at least 47 of the States. Such constitutional recognition illustrates the high preferred position granted to the writ in American law.

This Court stated in *Bowen v. Johnston*, 306 U. S. 19, 26, that:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired . . . ".

And see 28 U. S. C. Sec. 1914(a); 28 U. S. C. Sec. 1915.

Habeas corpus is the procedural safeguard of personal liberty; it is the "freedom writ". It is the means, the device, by which a person wrongly detained can secure his liberty. Hendrick, *op. cit. supra*, did not, we submit, overstate the case when he wrote that:

> "Nothing suggestive of the French lettres de cachet . . . . is possible under the American System . . . "

because of habeas corpus.

But is habeas corpus relief to be limited to those who can pay filing fees? To hold that habeas corpus petitions cannot be filed without payment of filing fees means that a basic remedy, guaranteed in both federal and state constitutions, is available to the rich, but not the poor. Such a holding we submit is squarely contrary to the teaching of *Burns* v. *Ohio, supra,* and *Griffin* v. *Illinois, supra.*

3. State and Federal Court Decisions Extending *Griffin* v. *Illinois* to Habeas Corpus Proceedings

The reasoning of *Griffin* v. *Illinois, supra,* has been extended by one state court to state habeas corpus proceedings. *Barber* v. *Gladden,* 298 P. 2d 986 (Ore. 1956). In the *Barber* case, Barber sought a writ of habeas corpus against the warden of the Oregon State Penitentiary. Barber presented a motion for an order authorizing the judge of the circuit court to direct the county treasurer to post an undertaking on appeal and pay all fees and costs on appeal, or in the alternative to order the requirement waived. Grounds for the motion were that Barber was an indigent person wholly without funds, personal or otherwise, to pay such fees or costs or to post an undertaking required to prosecute said appeal. The motion was accompanied by an affidavit of poverty. The court held that to enforce the provisions of the Oregon statutes requiring an appeal bond, as applied to the case of an indigent appellant, was unconstitutional "by the necessary implications of the decision of the United States Supreme Court" (298 P. 2d at 990), and that the "enforcement in this case of the requirement for an appeal bond would violate the Equal Protection Clause of the 14th Amendment and therefore that the statute is to that extent and in this application, unconstitutional". 298 P. 2d at 990. In reaching this decision, the court stated:

"If a pauper who appeals to a state Supreme Court from alleged ordinary non-constitutional errors of law is entitled, under the Equal Protection Clause, to such assistance as will make possible the fair presentation of his case, then surely the United States Supreme Court would hold that a pauper who claims that he is imprisoned under a void judgment would be entitled under the same clause to the waiver of the requirement of a bond for costs if such waiver is necessary to the presentation of his appeal."

And the Oregon Supreme Court continued:

"It may be that a distinction will be suggested between the two cases, because *Griffin* v. *Illinois* was a criminal appeal whereas Barber's appeal is in a civil action for habeas corpus. But the argument cuts the wrong way. To be sure habeas corpus is in form a civil proceeding, but it is one based upon the provisions of the Oregon constitution. Its function, as applied to persons in prison for crime, is to afford relief from confinement under a void judgment, a wrong which transcends in seriousness mere errors of law at a trial." 298 P. 2d at 990."

The same question was considered by the Federal District Court for Oregon in the case of *Daugharty* v. *Gladden*, 150 F. Supp. 887 (D. C. Oregon 1957). A petition for a writ of habeas corpus was filed in the Federal District Court. The petitioner had been sentenced to 15 years in an Oregon court for issuing a forged check; he claimed in the habeas corpus proceedings that his constitutional rights were violated in his original trial. On December 9, 1954, he had filed a petition for habeas corpus in the State Court for Marion County; on July 11, 1956, the petition was denied; on August 17, 1956, he filed a petition for leave to

appeal with the Supreme Court of Oregon without paying the $20 statutory filing fees, or posting statutory undertakings; this petition was allowed by the Supreme Court of Oregon on August 20, 1956. On September 26, 1956, petitioner filed a motion for a praecipe on appeal seeking to have the Clerk in the Marion County habeas corpus proceedings pay for the record. On October 3, 1956, the Oregon Supreme Court denied plaintiff's motion. On November 21, 1956, the Attorney General of the State moved to dismiss petitioner's appeal; on November 25, 1956, the petitioner filed a petition for certiorari in the Supreme Court of the United States; on December 28, 1956, the Supreme Court of Oregon dismissed the appeal; on February 25, 1957, the Supreme Court of the United States denied petitioner's petition for certiorari. 352 U. S. 1009. The District Court, on these facts, held that the remedies of the petitioner were not exhausted since the statute of Oregon allowed a review by the Supreme Court of Oregon by original writ of habeas corpus *in forma pauperis*. In the course of his opinion, the District Judge said:

> "This court is of the opinion that . . . the statutes of Oregon requiring the payment of fees to the County Clerk . . . in order to obtain a transcript required by the statutes of Oregon relative to appeals to the Supreme Court are unconstitutional and violative of the constitutional rights of petitioner under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States. In particular the petitioner was denied an appellate review of the Circuit Court order dismissing his writ of habeas corpus for the reason that he was without funds to pay for the same. . . . Appellate review of a judicial determination cannot be on one hand allowed the rich, and on the other, denied the poor." 150 F. Supp. at 891-892.

In *Daugharty* v. *Gladden*, 257 Fed. 2d 750 (Ninth Circ. 1958), the Court of Appeals for the Ninth Circuit reversed the District Court on the ground that the petitioner had exhausted his State remedies. In the course of the opinion, the Circuit Court decided the question: Did the dismissal of the state appeal because of petitioner's financial inability to furnish an appellate transcript deprive him of the equal protection of the laws under the 14th Amendment? The court held that such denial did deprive him of the equal protection of the laws. At 257 Fed. 2d p. 759, the court said:

> "Here the question involves the supplying of a required transcript on appeal in a habeas corpus proceeding, in which it is claimed that there were violations of constitutional rights under the Oregon constitution which rendered the judgment of conviction void.
>
> The Oregon Supreme Court has held that the Griffin rule applies regardless of such a distinction in the nature of the proceedings. In Barber v. Gladden, 210 Oregon 46, 298; P. 2d 986, 990; 309 P. 2d 192, it was held, applying the rule of Griffin, that a statute which requires an applicant for a writ of habeas corpus to file an undertaking on appeal, in order to obtain an appellate review, is unconstitutional as applied to an indigent person, thus requiring waiver of the statutory requirement . . . "

And again at 257 Fed. 2d p. 760:

> "We agree with this view where, as in this case, inability to furnish a required bond or transcript is all that stands in the way of an otherwise appropriate and properly perfected appeal. The indigency of an appellant in such a proceeding ought not to deprive him of a right to appeal which the state purports to accord all of its citizens."

The subsequent history of *Daugharty* v. *Gladden* will be found at 179 Fed. Supp. 151.

In *Commonwealth* v. *Banmiller*, 160 A. 2d 126 (Superior Ct. Pa. 1960), the Court held that habeas corpus was a civil action and that, therefore, the state could constitutionally require a $12.00 filing fee. In reaching this decision the Court relied heavily on the denial of a writ of certiorari by this Court. Said the Superior Court: " . . . it appears to us that the Supreme Court of the United States would not have refused the Burge petition for certiorari to the Supreme Court of Pennsylvania (No. 463, Misc., Oct. 1960 Term, 4 L. ed. 2d 549) on its order dealing only with the payment of a filing fee had it intended so recent a decision as Burns v. State of Ohio, supra, to apply to the civil action here involved." 160 A. 2d at 127. It is unnecessary to cite authority for the proposition that denial of certiorari is not a holding on the merits by this Court.

Thus two appellate courts, one state, the other federal, have held that *Griffin* v. *Illinois* requires the states to grant indigent prisoners free access to the courts in habeas corpus proceedings. We submit that a like decision in this case necessarily follows from *Burns* v. *Ohio;* that, to paraphrase the Superior Court of Oregon, surely this Court will not sanction state procedures which bar indigents from using state courts in habeas corpus proceedings, especially where, as here, the prisoners allege that they are imprisoned under processes and procedures void because unconstitutional. All these petitioners ask is that someone, sometime, somewhere read their petitions and rule on the merits of their claims.

4. *The holding of Burns v. Ohio need not be extended to all civil actions.*

It may be argued that the extension of the doctrine of *Burns v. Ohio* to habeas corpus proceedings necessarily means that the doctrine will be extended to all civil actions. For the reasons already set forth, we submit that habeas corpus is no ordinary civil action; the Court can certainly draw a line at habeas corpus proceedings.

Indeed, such a line has already been suggested by former Chief Justice Stanley E. Qua, of Massachusetts. Justice Qua wrote:

> "How about civil cases. Here again, as Mr. Justice Harlan points out, logic would seem to place no limits upon the *Griffin* rule. It would seem to be equally applicable to plaintiffs and defendants. However, the concern of the Supreme Court in recent years has been with personal liberty. Civil cases seldom involve personal liberty. A clear line of distinction is available, even if not logical . . . I agree with the Supreme Court of Oregon, which said through Mr. Justice Brand in *Barber* v. *Gladden*, 'We think the Supreme Court will not carry its ruling to such coldly logical extremes as would disrupt the accepted judicial procedures of 48 states.' That was a habeas corpus proceeding and therefore a civil case, but the personal liberty of a prisoner was involved, and the court held the Griffin case applicable as in criminal cases. The implication seems to be that it would not be applicable generally." Stanley E. Qua, *Griffin* v. *Illinois*, 25 University of Chicago Law Review 143, 149-150.

See also the remarks of Hon. Frederick G. Hamley, United States Circuit Judge before the Judicial Conference of the 9th Circuit, 24 F. R. D. 75, 80-81.

5. The federal constitution guarantees a post conviction review of a claimed violation of constitutional rights.

It is submitted that state courts are required by the federal constitution to afford some corrective judicial process by which a claimed violation of constitutional rights can be tested in the state courts. In *Mooney* v. *Holohan*, 294 U. S. 103, this Court stated that it was not at liberty to assume that a state denied its court jurisdiction to redress a prohibited wrong. And in *Young* v. *Reagan*, 337 U. S. 235, the Court had before it a problem involving Illinois procedure for the "vindication of federal rights", 337 U. S. at 238, after conviction. The prisoner had attempted to obtain a writ of habeas corpus. The writ was denied without a hearing for the reason that it was "insufficient in law and substance". 337 U. S. at 237. The Attorney General of Illinois explained the denial of the petition for the writ as based upon state procedural grounds: that habeas corpus was not an appropriate remedy for the relief of denials of due process. This Court, speaking through Chief Justice Vinson, stated:

> "Of course we do not review decisions which rest upon adequate non-federal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights . . . But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of federal right. And that is the effect of the denials of habeas corpus in a number of cases now before this Court . . . Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this court has required the scrupulous adherence of all federal courts, see Ex parte Hawk, 321

U. S. 114, and cases cited, presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adopting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met. If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case." 337 U. S. at 238-239.

The Special Committee on Habeas Corpus, Report to the Conference of Chief Justices, App. at 12 (Council of State Governments, 1953) quoted from a memorandum of the Department of Justice of California as follows:

> "If any proposition can be stated dogmatically in this field it is this: State courts must provide post-conviction corrective process which is at least as broad as the requirements which will be enforced by the federal courts in habeas corpus through the due process clause of the 14th Amendment. A state can call this remedy whatever it wants, but it must provide some corrective process. Cf. Mooney v. Holohan, 294 U. S. 103."

See also Shaefer, *Federalism and State Criminal Procedure*, 70 Harvard Law Review, 1, 16.

If a state must provide a post-conviction method by which denial of constitutional rights are tested, then surely the state cannot deny such remedy to paupers, and make it available to those able to pay. In this respect, it matters little whether the post-conviction method is termed civil or criminal. Consequently, the civil-criminal distinction discussed above has no bearing on the cases at bar.

It is, therefore, submitted that the states have a constitutional duty to provide a method by which denial of constitutional rights can be tested after conviction; these petitioners are not allowed to use the available state remedy because of their poverty. This is surely a denial of due process and equal protection of the laws.

6. Exhaustion of State remedies.

It may be argued that the petitioners have exhausted their state court remedies and are now entitled to proceed in the federal courts. *United States ex rel. Marcial* v. *Fay*, 247 F. 2d 662 (Second Circ. 1957). But as Judge Medina pointed out in the *Fay* case, *supra*,

> "The requirement of exhaustion exists because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation', Darr v. Burford, 339 U. S. 200." (247 F. 2d at 665.)

The petitioners at bar are unable to exhaust their state court remedies without payment of fees which they are unable to pay. Hence, although in one sense state court remedies are exhausted, the teaching of *Darr* v. *Burford*, *supra*, indicates that the better practice would be to have the state courts pass on the constitutional claims of petitioners before the federal courts are involved.

D. State Court Decisions Are Not Binding on Supreme Court of the United States When Provisions of the Federal Constitution Are Involved.

The Attorney General of the State of Iowa in his original brief in response to the petitions for certiorari argued that failure to comply with state procedure, including payment

of the filing fees required by the Iowa Code, was an adequate state ground for the Iowa Supreme Court decision. Of course, procedural laws of the State are controlling as long as they are constitutional under the State and Federal Constitutions. It begs the question, however, to say that Section 606.15 and Section 685.3 are laws of the state, hence must be followed by the United States Supreme Court. This might have been so before the 14th Amendment to the United States Constitution; but that amendment precludes such an argument when the constitutionality of the state procedural laws is drawn into question. *No State* shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The laws of the State of Iowa which the Attorney General has set up as a defense are exactly the laws which the petitioners in these cases challenge as being unconstitutional as applied to them under the facts of these cases. If the Attorney General's argument is correct, the Court would never have reached the decision it did in *Burns* v. *Ohio*, 360 U. S. 252, or *Griffin* v. *Illinois*, 351 U. S. 12.

E. The Petitioners Are Appealing From a Final Judgment of the Iowa Courts.

The applicable federal jurisdiction statute, 28 U. S. Code, Sec. 1257, provides that a petition for certiorari will be granted only in cases of a final judgment of the court of last resort of the State having jurisdiction. It is true, of course, that there are slight variations in the handling of these cases in the state courts.

In *Marshall* v. *Bennett*, No. 177, the District Court judge denied petitioner the right to file his petition for habeas corpus without payment of the requisite filing fee (MR 6). Subsequently the court issued another order in which it

stated that nothing had ever been filed in the District Court (MR 10). Petitioner moved in the Supreme Court of Iowa for an order for leave to proceed with the appellate litigation without the prepayment of any statutory costs or filing fees (MR 13), and supported this motion with an affidavit in which he stated under oath that he was "without funds or property of my own; nor money, nor means to obtain money with which to pay the statutory filing fee for docketing this appeal, and unless this attached motion is sustained I will be unable to obtain the relief to which I believe I am entitled by this appeal . . ." (MR 15). On October 20, 1959, the Supreme Court of Iowa issued an order reading simply: "Application denied" (MR 17).

In *Smith* v. *Bennett*, No. 174, the petitioner made a motion in the District Court, in connection with his attempt to file a petition for a writ of habeas corpus, in which he moved that the court allow said petition to be filed *in forma pauperis* (SR 5) and accompanied said motion with an affidavit stating that he "was without funds or property and without sufficient funds to pay the filing fee" (SR 6). The petition and motion were returned to him by the deputy clerk of the Lee County District Court with a letter stating that the petition would be presented to the judge if the $4.00 filing fee were sent (SR 7). Smith then moved for leave to appeal *in forma pauperis* in the Supreme Court of the State of Iowa (SR 8), and the Supreme Court of Iowa on the 15th day of December, 1959, entered an order denying the motion for leave to appeal the order of the Clerk of the District Court (SR 10). Thus, in both Marshall and Smith, the petitioners have been denied the right to have their petition for a writ of habeas corpus considered by the District Court because of their inability to pay the statutory filing fees required by Section 606.15, 1958 Code of Iowa. Both petitioners have likewise been denied the

right to proceed *in forma pauperis* with their appeal in the Supreme Court of the State of Iowa. Certainly, the orders of the Supreme Court of Iowa, more than the letter from the Clerk of the Ohio Supreme Court involved in *Burns* v. *Ohio*, 360 U. S. 252, are final judgments within the meaning of 28 U. S. C. 1257.

Thus, the doors of the courts of the State of Iowa have been effectively closed to these two indigent prisoners who, because of their poverty, are unable to pay the requisite filing fees. Until they pay the filing fees, the courts of Iowa will take no further action; since they are unable to pay the filing fees, they will have no other course open in the Iowa courts, unless this court holds unconstitutional Sections 606.15 and 685.3, 1958 Code of Iowa, as applied to habeas corpus proceedings.

Conclusion

The Fourteenth Amendment means that in criminal proceedings rich and poor are to be treated with an equal hand. Ability to have questions of freedom determined by State courts should not turn on the condition of a prisoner's pocketbook. Habeas corpus, although often called a civil action, is more than an ordinary civil action; it is a means designed to insure the liberty of the person, a bulwark of personal freedom. A prisoner should not be denied access to habeas corpus proceedings merely because he is without means; certainly the rich should not be allowed to file petitions for habeas corpus, while the poor are denied the right. Here, then, is the heart of these cases: can the State constitutionally close the doors of its courts to indigent prisoners seeking habeas corpus relief?

We urge this Court to hold Sections 606.15 and 685.3, 1958 Code of Iowa, unconstitutional as applied to habeas corpus proceedings, and to remand these cases to the Iowa courts so that these petitioners can at long last have their claims considered on the merits.

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